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COLOMBIA

The following is a review of recent legislative and administrative developments in Colombia, submitted by a correspondent law firm.

I. COMMENTS ON THE URBAN REFORM LAW

The President sanctioned on January 11, 1989, Law 09 of the same year, amending Decree 1333 of 1986 (Code of Municipal Regime). This law establishes provisions for plans for municipal development, as well as the selling and expropriation of property.

One of the main points of this law is the obligation for all municipalities exceeding 100,000 inhabitants (including the Special District of Bogota and the Special Intendency of San Andres and Providencia) to formulate a plan for development. The objective of these plans is to serve as means for the promotion of the development of cities and their areas of influence. Those cities with less than 100,000 people will draw up simplified plans. These plans must be reviewed by the mayor of the respective city, and approved by the City or Intendency Council.

Among other subjects, plans must contain provisions on the following: use of land; road plans; plans for public services and public works; investment programs; and the reservation of land for urbanization.

On the acquisition of property by selling or expropriation, the Law establishes the possibility of expropriation taking into account the property's public usefulness, as well as its social interest, meaning basically the property's suitability for the execution of Development Plans, the execution of public works and urbanization projects with priority. Thus, the acquisition or expropriation of property will be executed in agreement with the objectives established in said plans.

The acquisition requires an offer of buying which price must be based on the appraisal made by the Geographical Institute "Agustin Codazzi" or the entity in charge of its functions. When the acquisition of property has been decided upon, an offer must be transmitted to the owner in the five working days after the order to buy has been issued. The properties thus affected cannot be

sold nor can any lien be placed upon them after the inscription has been made in the property register. If the parties agree on a price and other conditions, a promise or a sales contract is executed.

The expropriation takes place when the term has lapsed and the promise or the contract has not been executed. However, if this is due to default on the part of the public entity, the owner does not lose his claim to the special conditions in the payment of the price established in Article 15. Likewise, an expropriation can be ordained if the owner defaults in his obligation to transfer to the acquiring entity the ownership or when the owner, having been duly notified of the entity's decision to buy, rejects any negotiation attempt.

The legal representative of the entity doing the expropriation must issue the decision (duly motivated), which decision must be rendered in the five following working days. Interested parties can appeal this decision before said legal representative within the ten working days following the notification. If one month passes without a decision having been reached on the appeal, it is understood that the appeal has been rejected, leaving the interested parties access to contentious administrative actions.

The expropriation requires judicial procedures, in which the entity files suit against the owner. Before the applicability of Law 09, expropriations were enacted by means of administrative resolution. Law 09 establishes that administrative resolutions of this kind on which no lawsuit has been filed by the public entity doing the expropriation do not produce any effects whatsoever. These procedures end with a sentence in which the judge orders the payment of indemnity if necessary.

The public entity having acquired the property, whether by expropriation or contract, must give said property the use for which it was expropriated or bought. If said use is not kept within the five years following the expropriation, the property must be resold, with a special claim by the former owner.

Chapter 4 of the law refers to the expropriation of real estate having been used as living quarters, when said expropriation is the consequence of urban renewal by public entities. There are several possibilities. One is that the occupant of the building is the owner, and the urban renewal project refers to housing, in which case said owner acquires the right to one or more of the housing units being built. If the occupant is the owner but renewal is not due to a

housing project, said owner will have the right to living quarters in an urbanized zone of the city. In these cases, the owner can opt either for the payment of the price or for a new residence. If the occupant does not own the edifice, then the worth of the possession and improvements is appraised.

These provisions, however, do not apply to owners or possessors not inhabiting the premises, nor to people owning or occupying property exceeding in worth social interest housing. The price of social interest housing will be established in agreement with charts based on the minimal monthly wage.

The new law dictates that, in order to initiate construction or reparation in buildings of any kind, a municipal license must be obtained. Builders must obtain insurance certificates in which indemnification is guaranteed. When urban development laws are violated, city mayors can impose fines on the infractors. The decisions imposing fines can be challenged through contentious administrative actions.

Law 09 also establishes the extinction of ownership of property. This is a procedure that can be initiated by the municipalities so that the extinction of ownership of property may be decreed when a person uses urban buildings or real estate in violation of the provisions of the Development Plan, that is, when, in contradiction with the National Constitution, a property does not serve its social ends. This decision can refer to real estate on which no edifice has been built or no liveable construction has been made. These procedures start with a motivated decision against which appeals may be filed within the fifteen working days following its rendering. If two months lapse without a decision having been reached on the appeal, it is regarded as having been denied, notwithstanding the sanctions that may be imposed on the responsible public official.

II. ECONOMIC ASPECTS OF THE CONSTITUTIONAL REFORM BILL

Congress approved a draft constitutional reform bill by government initiative on December 13, 1988. The bill contains eighty-eight articles and substantially amends provisions of the National Constitution, including most of the regulations dealing with the national economy. The following briefly analyzes the most important of these amendments.

What strikes a first-time reader of the bill is the abundance of

provisions not containing a specific directive, but, rather, stating principles and beliefs, a common practice in the 19th century. In this regard, it is worth noting the following provisions: "The State organized for common good, guarantees the participation of the people in the economic, administrative, economic, social and cultural life of the country" (article 3); "The State can establish the proper means in order to guarantee for all Colombians, and specially the workers, an easy access to property, the administration of capital factors, and said Colombians the benefits derived therefrom, as well as the procedures to enact from them their responsibility" (article 9, section 5); and "The State will foster a legal system of collaboration with private parties in order to achieve economic development and social justice, through the law or agreements with said private parties. It will also stimulate the systems for an economy of solidarity" (article 11).

It should be noted that the bill incorporates into title IV of the Constitution ("On human, politic, economic and social rights, and duties and guarantees," formerly, "On civil rights and social guarantees") the human, civil, and political rights established in the International Convention on Civil and Political Rights approved by the United Nations on December 19, 1966 (Law 74 of 1968) and the American Convention on Human Rights adopted by the Organization of American States on November 22, 1969 (Law 16, 1972). Some of these rights are of an economic nature.

Of interest is article 13 (amending article 49 of the Constitution), in which a doubtful mechanism of monetary control is established by means of the suppression of most of the Central Bank's functions:

The Central Bank cannot establish credit quotas for private parties or entities, unless the funds are to be used as transitory support for liquidity of financial institutions, nor can it grant credits as a fiscal arbiter. Credits to the Government can be granted by the Central Bank in order to offset transitory treasury deficits and guarantee the payments. These operations must be cancelled within the budget year.

(Sections 2 and 3).

The reform to the *Contraloria General de la Republica*, the office in charge of supervising the execution of the public budget, is done by means of the creation of a Court of Accounts (Arts. 16 and 17) with three members elected by the Lower Chamber for four-

year periods. It is doubtful whether these provisions eventually will be approved, since a significant number of Congresspeople are not interested in such a court and would rather not modify the present system.

Since 1968, the President has had, among his powers, the constitutional authority to make necessary interventions in the Central Bank, as well as in the activities of all corporations dedicated to the handling, exploitation, and investment of all funds generated by private savings. The bill modifies the extent of this authority when it establishes (Article 23, Section 22) that Congress must define the broad outline for the use of those functions by means of laws called "frame laws." This term refers to the fact that the laws do not contain specific provisions on a given matter, but rather suggest general policies to the government.

Most other sections of the constitution dealing with economic matters have been modified on technical but not substantial matters (i.e., plans for development, national budget) or have been left unchanged (i.e., economic and/or social emergency).

In the Colombian system, a constitutional reform requires the following procedures: its approval by the constitutional commissions of the Senate and Chamber of Representatives; the approval by the Chambers themselves; the publication of the bill; and new approvals by the commissions and chambers. The first and second rounds of approval, under a special, more demanding, majority rule than the one required for ordinary laws, must take place in different ordinary legislatures (an ordinary legislature takes place in the 120 days following July 20 of each year). The above-mentioned project has gone through the first part of the process. The second part will be a battle of wills between the Government and significant sectors of Congress that do not agree with substantial portions of the reform, such as the Court of Accounts, the prohibition of presidential reelection, and the suppression of Catholicism as the nation's religion.

III. FOREIGN DEBT AUTHORIZATION STATUTE APPROVED BY CONGRESS

A bill (No. 039/88) granting the President authorization to renegotiate foreign debt was submitted to Congress by Conservative Party Senator Gabriel Melo Guevara. The bill was approved with substantial amendments and became Law 87 of December 29,

1988.

The law authorizes the government to reorder, restructure, and/or renegotiate, wholly or in part, the public foreign debt. In exercising this authorization, the national government can execute the necessary contracts with foreign governments, financial international institutions, and commercial banks. It can also involve the nations's responsibility when certain public entities default in the payment of their obligations. Article 3 states that all renegotiations taking place under this authority shall be subject to the legal provisions governing public foreign credits. It appears that this article must be interpreted in agreement with Article 5 which requires that a formal decision of restructuring be reached by the Cabinet as a condition for the use of certain faculties defined in that same article, *see infra*. Thus, renegotiations being performed before such a decision has been reached probably will not be subject to Law 87.

Law 87 (Article 5) also grants the President special powers, in case of a general rescheduling of the foreign debt, to issue decrees-laws on the following matters: the determination of the procedures by which the nation and the public entities will continue to pay their obligations deriving from foreign credits in compliance with their respective contracts' original terms, the creation of the instruments for the collection of payments due the public entities when their obligations are renegotiated, the establishment of the procedures for the transference of these moneys, the determination of the necessary financial operations and the creation of a system of sanctions for all public officials refusing to comply with the aforementioned procedures.

These powers are granted to the President for a six-month period following the decision by the Cabinet that the country's foreign debt must be reordered, restructured, or renegotiated.

IV. FINANCIAL LAW

A. Outlines for the Subscription of Shares in Financial Entities

The Superintendent of Banks provided useful outlines to be followed by financial entities subject to state control when augmenting the number of shares in which their capital is divided. In a recent document (External Circular No. 066 of October 31, 1988, derogatory of Circular OJ-022 of February 13, 1979) the state en-

tity outlined the procedures to be followed when new shares are to be placed among the stockholders of a financial institution.

According to the Superintendent, the following steps should be taken into account:

1. The subscription of new shares generally requires a set of regulations (Code of Commerce art. 365, § 1), which should be approved by the board of directors, unless it was otherwise stated in the articles of incorporation. These regulations must indicate the number of shares to be offered, the proportions in which they will be subscribed by the shareholders, the subscription offer's validity (between fifteen days and three months), and the price and mode of payment (if credit is granted, commonly at least one-third of the price should be paid off when subscribing the share, and the rest within one year of that date).

2. These regulations must be authorized (not approved — the approval is granted by the board of directors or other competent company entity) by the Superintendent of Banks.

3. The offer of subscription must be made.

4. If the shareholder is interested, a contract of share subscription must be made. If not, he can negotiate his right to subscribe his share of stocks with a third party, but only after the offer has been made.

5. After the term for subscription has lapsed, the company must inform the Superintendent of Banks of the subscription procedures.

On right of preference matters, the Superintendent held that the shareholder's right of preference when subscribing new shares is determined by the number of shares he owns when the offer of subscription is made. It is possible to ignore the right of preference, but only if it was stated thus in the articles of incorporation or it was agreed upon by the General Assembly of shareholders.

B. Financial Institutions Must Inform on Fiscal Auditors

The Banking Superintendent continued its crackdown on improper business practices by financial entities. The latest blow is Circular Letter No. 005 of January 16, 1989, by which it was requested that all financial entities under state vigilance inform the names of their fiscal auditors, both principal and substitute, whether a person or an auditing company, in order to compile a

register. Financial entities will have to provide other documentation on their auditors, such as identification, license, and the date on which the auditor began working for the company. When a company changes its auditor, the certificate of the Chamber of Commerce witnessing the substitution must be sent to the Superintendent.

C. Provisions on Stock Exchange

The crisis that shook the stock and bonds market in 1988 dictated a proliferation of restrictions on this activity, once the most irregular in the financial system.

Resolution 008 of October 19, 1988 of the National Securities Commission establishes that all purchases and sales of shares in companies listed on the stock exchange for amounts equal to or exceeding Col\$200,000 must be routed through the exchange. This same principle had been adopted by Resolution 002 of October 22, 1987.

Resolution 009 of October 19, 1988 of the National Securities Commission regulates the Guarantees Funds that must be constituted within each stock exchange by January 1, 1989. The only objective of these funds is to answer to the clients of stockbrokerage firms for their obligations to pay or return money or stocks. Commencing in 1991, the net worth of each fund must not go below 0.24% of the total worth of all operations performed within the respective stock exchange. The funds must be owned by a corporation constituted for that effect. Even though Article 2 of the Resolution authorizes the funds to take the form of an "autonomous patrimony," the Colombian legal system does not admit patrimonies not linked to a specific person or corporation. At any rate, the articles of incorporation of a fund must be approved by the President of the Securities Commission. Each fund's resources must be invested in high-liquidity state papers. The funds must send their balance sheets to the Commission on a quarterly basis.

Resolution 355 of October 20, 1988 of the National Securities Commission provides criteria in order to determine whether the acquisition of shares by a stock brokerage firm is allowed. Stock brokerage firms can acquire securities other than company shares in order to foster their patrimonies. Thus, they cannot use any kinds of financing, including credits or loans. When they acquire the securities they must do so after private orders of purchase have

been served and never on more favorable terms than those granted to private investors. These purchases cannot be used for speculation, but merely as an investment. Firms cannot buy shares of companies listed in the stock exchange except in the following situations: when the respective firm is organized as a corporation and the purchases are destined to provide liquidity for the market, or when the shares have been inherited by or donated to the firm. Practices other than those involving a firm's own resources and securities or shares being negotiated through the exchange are regarded as trading with insider information.

Of great importance is a bill containing a detailed legislation on all activities connected with stock trading. The following are the main traits of this bill, submitted to Congress by the Minister of Economic Development. The stock exchanges in the different cities must adopt, within a year, a corporate structure. Only companies can be shareholders to a stock exchange and dividends can only be paid through the subscription of new shares. Moneys can be paid to the firms only when the stock exchange has been duly inscribed in the National Bonds Register. New regulations are provided for corporations administering bond portfolios, called "centralized securities deposits." European tendencies are welcomed in the bill, where two kinds of shares are admitted: ordinary shares, regulated in the Code of Commerce, and shares with preferential dividends but not the right to vote in general assemblies of shareholders. The latter can only be issued by corporations under the following conditions:

1. That they be under state supervision (Banking Superintendent or Superintendent of Industry and Trade).
2. That the emission of said shares be authorized in the articles of incorporation.
3. That the corporation's shares be registered in a stock exchange.
4. That during the two prior years, dividends were distributed among shareholders.
5. That no privileged shares or industry shares (Code of Commerce, arts. 380, 381) have been issued.

These shares were created in European countries and so far have proven extremely useful in fostering investment in the productive sectors of the economy.

V. INTERNATIONAL LAW: NEW RULING ON ILLEGAL TRADEMARKS

The Court of Justice of the Cartagena Agreement recently provided useful criteria to be applied by the trademarks offices of the parties of said agreement when analyzing an application for a trademark.

In a ruling dated December 9, 1988 (*Daimler Benz Aktiengesellschaft v. Mitsuba Electric Mfg. Co.*, No. 4-IP-88), at the request of the Colombian Counsel of State, the Court gave an interpretation of Article 58, sections a, f, and g, and Articles 62 and 64 of Decision 85 (on industrial property) of the Cartagena Agreement.

The Court observed that Article 58 of Decision 85 in which the different grounds for the dismissal of a trademark application are indicated, does not repeat itself in its different sections, but rather establishes a number of situations that involve deeper or lighter notions of public interest.

According to the Court, section a of Article 58 refers to illicit trademarks, defining these as the trademarks violating morals, public order, or misleading the consumer as to certain traits of the goods or services being offered (their nature, origins, means of manufacturing, usefulness, etc.). Morals are defined as "customs generally agreed upon and observed by the community in a given place and time." Public order is construed as the empire of the law of public tranquility that must be guaranteed by the State." When section a refers to "misleading trademarks," it is pointing to a specific notion: when a trademark violates consumer rights, and not when it merely attempts to duplicate a registered trademark as a means for profit, as the latter situation violates the individual rights of the prior registration and thus is covered by the other sections of Article 58. Sections f and g of Article 58 refer to trademarks that may be confused with other trademarks of a prior registration. Establishing this situation (when a trademark can be easily confused with another trademark) can be very complex when dealing with mixed trademarks, that is, those composed of graphic and nominative elements (i.e., pictures and words). In this matter, the Court outlined the following rules: in a mixed trademark one of the elements must prevail, either the graphic element or the nominative element. When comparing two mixed trademarks there are two possibilities:

1. That the dominant element of one of them is the graphic

element and the prevailing part of the other is the nominative part. In this case there can be no confusion and the registration must be granted.

2. That the prevailing part in both is the same: either the graphic or the nominative.

When two graphics are compared, the Court maintains that the analysis must be made taking them into account as a whole, rather than as a collection of elements that may or may not be similar between them. Usually, the nominative element prevails in mixed trademarks.

According to the Court, a trademark registration granted in violation of section a of Article 58 of Decision 85 is flawed by absolute nullity, whereas the violation of sections f and g produces relative nullity. The difference between absolute and relative nullity is, mainly, that when the latter occurs only an interested party can sue to have it declared. When the case is the former, any person can be an interested party, and even the authorities themselves can make the declaration without prior request. The prescription terms also differ. Inasmuch as Decision 85 does not contain provisions on nullity or annulment, this matter must be regulated according to the legislation of the country in which the case takes place. In Colombia, this difference does not exist, as the Colombian Contentious-Administrative Code (Decree-Law 001 of 1984) does not establish different kinds of nullity when administrative resolutions are concerned. Moreover, Colombian authorities can reverse, *ex officio*, any administrative resolution that evidently violates the constitution or law, is contrary to public interests, or is the cause of unjustified wrong towards a person, as would be the case of a resolution by the trademarks office granting a trademark that violates any of the sections of Article 58 of Decision 85. In any case, it is clear that the registration of a trademark that can be confused with another one previously registered to cover goods in the same class is not valid. It is also true that the trademarks offices of all parties to the Cartagena Agreement must verify the compliance of an application with all the provisions of Decision 85, before granting a trademark registration.

CAVELIER ABOGADOS
Bogota, Colombia